

**Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.**

DATE: December 12, 1997
CASE NO: 96-INA-377

In the Matter of:

YEKTA DELI IMPORTED GROCERIES
Employer

On Behalf of:

ALI GHAMGOSARNIA
Alien

Appearance: Michael B. Schwartz, Esquire
Rockville, MD
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,¹ and any written argument of the parties. § 656.27 (c).

Statement of the Case

On August 16, 1994, Yekta Deli Imported Groceries ("employer") filed an application for labor certification to enable Ali Ghamosarnia ("alien") to fill the position of Manager at an hourly wage of \$ 10.90. The job duties are described as follows:

To manage retail Middle Eastern Specialty Food store, plan and prepare work schedules for store employees, assign specific duties, take inventory, reconcile cash with sales receipts, keep operating records, prepare daily records of transactions, replenish merchandise on hand, answer customers' inquiries and complaints, hire and train store employees, formulate pricing policies, mark-ups and direct workers concerning merchandise displays.

The employer required two years of experience in retail management, along with "knowledge of Middle Eastern grocery/food items and familiarity with spices, condiments and ingredients."

On September 22, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The employer asserted that no one responded to its advertisement or posting notice. However, the CO noted that the state employment agency referred two applicants to the employer, and that the employer failed to provide any documentation showing attempts to contact these two applicants. The CO concluded that the failure to contact these applicants is essentially considered an untimely contact which is prohibited under the regulations. The CO also found that the employer violated § 656.21 (b) (5) which mandates the employer to document that the requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has neither hired nor finds it feasible to hire workers with less training or experience. The CO observed that there was no evidence that the alien possessed two years of experience in retail management.

In rebuttal, dated November 21, 1995, the employer asserted that the state employment agency never provided the names and addresses of the two referrals, nor did either one of these

¹ All further references to documents contained in the Appeal File will be noted as "AF."

applicants ever contact the employer. The employer also pointed out that the alien attained two years of retail management experience while the alien was aged 15 to 17 years old.

The CO issued the Final Determination on April 15, 1996 denying certification. The CO found that the employer adequately rebutted the minimum requirements issue, but found that the employer remained in violation of § 656.21 (b) (6). The CO explained that the regulations require an employer to make good faith recruitment effort in that the employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. The CO noted that the state employment agency provided two referrals, Leonard Brown and Iftikhar Khan, to the employer in a letter dated February 27, 1995, and found that the employer's failure to contact them constituted an unlawful rejection.

On May 10, 1996, the employer requested administrative review of Denial of Labor Certification.

Discussion

The issue presented by this appeal is whether the employer provided lawful, job-related reasons for rejecting Applicants Brown and Khan under § 656.21 (b) (6) of the regulations.

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. § 656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. § 656.2 (b).

Although the regulations do not explicitly state a good faith requirement, such a requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Action taken by the employer which indicates a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

In *Moore's Barbeque House, Inc.*, 89-INA-308 (Jan. 15, 1991), a panel of this Board denied certification where the employer failed to take the initiative by contacting applicants who were referred by the state employment agency. The Board held that an employer has an obligation to carry out a good faith search for qualified U.S. workers. See *Creative Cabinet & Store Fixture Co.*, 89-INA-181 (Jan. 23, 1990) (*en banc*). In this case, the CO found that the employer unlawfully rejected Applicants Brown and Khan by failing to contact them after they were referred by the state employment agency. The employer responded by arguing that it had no method of contacting these applicants since the referral did not include their addresses or phone

numbers. The employer thus insisted that both applicants were lawfully rejected.

We disagree with the employer and hold that it did not meet its burden of establishing good faith recruitment. The employer did not make any effort to contact Applicants Brown and Khan. Rather than demonstrating that it made a good faith effort to contact these two applicants, the employer merely relied on the fact that it did not possess their addresses or phone numbers to justify rejecting them. We find it significant that the employer did not submit any evidence showing that it attempted to obtain this information from the state employment agency or the telephone directory. For the reasons stated, we find certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.